SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 397

STANDARD CIGAR COMPANY, a Florida corporation,
Petitioner,

vs.

TABACALERA SEVERIANO JORGE, S.A., a Cuban corporation, and SEVERIANO JORGE,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Thomas H. Anderson,
Sawyer & Bowen,
[illegible] Floor,
[illegible] National Bank Building,
Miami, Florida, 33131
Attorneys for Respondents.

[illegible] Printing Co., Inc., 80 Eighth Street, New York 14, N. Y. [illegible]

INDEX

Statement of the Case 2

Restatement of Facts 7

Summary of Argument 11

A. The Question As to the Situs of the Debt Owing by Standard Cigar Company 12

B. The Applicability of the Act of State Doctrine 26

1. The Conflict As to Extraterritoriality 28

2. The Conflict Regarding the Validity of the Power of Attorney 36

Conclusion 38

Certification 39

Table of Cases

Atkinson v. *Superior Court*, 310 P. 2d 145 25

Augstein v. *Banska A Hutni Akciova Spolecnost*, 124 N.Y.S. 2d 446 (1953) 22

Banco Nacional de Cuba v. *First National City Bank of N. Y.*, 270 F. Supp. 1004 (S.D. N.Y. 1967) 21

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 3, 4, 5, 32

Bank of Jasper v. *First National Bank of Rome, Ga.*, 258 U.S. 112, 42 S. Ct. Rep. 202 (1922) 24

Baumgardner v. *Southern Pac. Co.*, 177 S.W. 2d 317 (1943) 25

Bollack v. *Societe Generale Pour Favoriser, etc.*, 33 N.Y.S. 2d 986 (1942) 29

Burkhart v. *Circuit Court of Eleventh J. Circuit*, 1 So. 2d 872 (Fla. 1941) 25

Caldwell v. *Armstrong*, 342 F. 2d 485 (10 Cir. 1965) 14, 17

Chicago, R. I. & P. R. Co. v. *Sturm*, 174 U.S. 710 (1899) 24

Cleveland, etc. R. R. Co. v. *Pennsylvania*, 15 Wall. 300 (1873) 14, 18

Courtlandt Corporation v. *Whitmer*, 121 So. 2d 57 (D.C.A. 2, 1960) 24

Curry v. *McCanless*, 307 U.S. 357 (1939) 14, 19

Employers' Liability Assurance Corporation v. *Sedgwick, Collins & Co.*, 1927 A.C. 95 36

Farmers Loan and Trust Co. v. *State of Minnesota*, 280 U.S. 204 (1930) 14, 19

F. Palicio y Compania, S.A. v. *Brush*, 375 F. 2d 1011 (2 Cir. 1967), cert. den. 389 U.S. 830, aff'd per curiam 256 F. Supp. 481 (S.D. N.Y. 1966) 9, 23, 28, 29, 36, 37

Investment & Securities Co. v. *United States*, 140 F. 2d 894 (9 Cir. 1944) 14, 18

Isthmian Lines, Inc. v. *Canadian Stevedoring Company*, 216 F. Supp. 856 25

Kelly v. *Bastedo*, 220 P. 2d 1069 (Ariz. 1950) 15

Marteney v. *United States*, 245 F. 2d 135 (10 Cir. 1957) 14, 18

McGrath v. *Agency of Chartered Bank of India, etc.*, 104 F. Supp. 964 (1952) 25

Meade v. *United States*, 2 Ct. Cl. 24, aff. 9 Wall. 691 29

Menendez Rodriguez v. *Pan-American Life Insurance Co.*, 311 F. 2d 429 (5 Cir. 1962) 2-3

New England Mutual Life Insurance Company v. *Woodworth*, 111 U.S. 138 (1884) 17

Pan American Life Ins. Co. v. *Rodriguez*, 376 U.S. 779 4

Republic of Iraq v. *First National City Bank*, 353 F. 2d 47 (C.A. 2, 1965) (Cert. den. 382 U.S. 1027) 2, 11, 20, 21, 32, 33

Re Russian Bank for Foreign Trade, 1 Ch. Div. 745 (1933) 22, 34

Rodriguez v. *Pan American Life Ins. Co.*, 340 F. 2d 707 (5 Cir. 1965) 4

Rogers v. *Smith*, 185 F. Supp. 401 25

Sedgwick, Collins & Co. v. *Rossia Insurance Company of Petrograd*, 1 K.B. 1 (1926) 35

Smith v. *Ajax Pipe Line Co.*, 87 F. 2d 567 (C.A. 8, 1937) 15, 19

Standard Cigar Co. v. *Tabacalera, etc.*, 376 U.S. 780 (1964) 4, 5

Steingut v. *Guaranty Trust Co. of N. Y.*, 58 F. Supp. 623 (D.C. N.Y. 1944), aff'd 161 F. 2d 571 (2 Cir. 1947), cert. dismissed 332 U.S. 753, cert. den. 332 U.S. 807 28

United States v. *Belmont*, 301 U.S. 324 (1937) 28, 29

U. S. v. *Eiland*, 223 F. 2d 118 (4 Cir. 1955) 18

U. S. v. *El Paso Natural Gas Co.*, 376 U.S. 651 6

United States v. *Pink*, 315 U.S. 203 (1942) 28, 32

Vladikavkazsky Railway Company v. *New York Trust Co.*, 189 N.E. 456 (N.Y. 1934), 91 A.L.R. 1426 33

Weinress v. *Bland*, 71 A. 2d 59 25

Zwack v. *Kraus Bros. & Co.*, 237 F. 2d 255 ..... 23, 37

TEXTS AND STATUTES

36 C.J.S. § 204 (3), p. 644 38

70 C.J.S., p. 1312 15

50 U.S.C.A., Appendix, § 1 et seq. 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 397

STANDARD CIGAR COMPANY, a Florida corporation,
Petitioner,

vs.

TABACALERA SEVERIANO JORGE, S.A., a Cuban corporation, and SEVERIANO JORGE,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

This is a petition to review a decision of the United States Court of Appeals for the Fifth Circuit, which reversed a decision of the United States District Court for the Southern District of Florida. The essential question decided by the Court of Appeals was that a so-called intervention decree issued by the revolutionary government of Cuba did not divest the lawful owner of a debt from collecting the same from the debtor, a Florida corporation having its principal place of business in Tampa, Florida.

The basic question presented to and determined by the Court of Appeals in the case sub judice was disposed of

contrary to Petitioner's contention in the case of *Republic of Iraq* v. *First National City Bank*, 353 F. 2d 47 (C.A. 2, 1965) (cert. den. 382 U.S. 1027) which is not even referred to in the petition for certiorari.

The question presented by this petition is not essentially different from that presented in the *Republic of Iraq case* in which certiorari was denied by this Court. No reason exists and none has been shown why this petition stands on any different footing.

STATEMENT OF THE CASE

This action was originally brought in 1960 by Tabacalera Severiano Jorge, S.A., a Cuban corporation wholly owned by Severiano Jorge, a naturalized[1] American citizen to recover the purchase price of leaf tobacco sold to Standard Cigar Company, a Florida corporation. The action was brought in the District Court for the Middle District of Florida. The defendant answered alleging that the action should have been brought in Cuba on the ground of forum non conveniens. Standard had then and still has no office or place of business in Cuba, nor any agent there upon whom process could be served. Notwithstanding this, Standard's motion on the ground of forum non conveniens was granted.

From this judgment an appeal was taken to the Court of Appeals. Here the correctness of the lower Court's action was tested, not only with respect to the question of forum non conveniens, but also to the question as to the applicability of the Act of State Doctrine which was raised in the defendant's answer and motion to dismiss.

At the time of the hearing in the Fifth Circuit there was pending in that Court a case entitled *Menendez Rod-*

1. Citizenship was acquired shortly after the judgment here involved was rendered.

riguez v. *Pan-American Life Insurance Co.*, 311 F. 2d 429 (5 Cir. 1962). This was an action by Cuban refugees to recover on policies issued by a Louisiana insurance company. The District Court (the same one which dismissed Tabacalera) had dismissed *Rodriguez* on the ground of forum non conveniens and the two cases were argued in the Court of Appeals at about the same time.

At that time, what is now known as *Sabbatino* (*Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964)) had been decided by the Court of Appeals (for the Second Circuit), but was pending in this Court on a petition for certiorari. In its opinion of reversal in *Rodriguez* the Court of Appeals said:

> ". . . There are also certain rather obvious factual distinctions in Banco and these cases under consideration here. But the legal principles enunciated are fully applicable. In Banco the action was brought by the Castro government's financial agent who sought to invoke Cuban decrees, found confiscatory in nature, to recover from New York's defendants. Here we have Cuban nationals as plaintiffs seeking determination of their rights under contract with citizens of this country. The corporate defendants here, in effect, invoke as a bar to this litigation the decrees of Castro which would have the effect of erasing any rights of plaintiffs to monies which might be due them under contracts with American citizens. The point of convergence of these cases is clear: Our courts are not compelled by the Act of State doctrine to give force and effect to the decrees of the Castro government in Cuba. On the merits it was determined in Banco that the subject Cuban decrees were confiscatory and their effect was nullified by the trial court, which was affirmed on appeal.
>
> It is for the District Court to determine upon development of all the facts, by summary judgment or otherwise, whether the Cuban decrees are confisca-

tory or whether the particular decrees are otherwise violative of fundamental concepts of justice and, therefore, without status, in these particular cases.

If such decrees are found wanting by these standards it follows that they will not be given force and effect in our courts."

Accordingly *Rodriguez* was reversed. Then *Tabacalera* was reversed on the authority and for the reasons given in *Rodriguez*, the Court adding that the residual questions of law not dealt with in *Rodriguez* could more properly be dealt with in the District Court on the merits.

Petitions for certiorari to this Court were filed. This Court granted the certiorari pending in *Sabbatino* and reversed the Court of Appeals' opinion. It then remanded *Rodriguez* and *Tabacalera* "for further consideration in the light of *Sabbatino*." *Pan American Life Ins. Co.* v. *Rodriguez*, 376 U.S. 779; *Standard Cigar Co.* v. *Tabacalera, etc.*, 376 U.S. 780 (1964).

Accordingly, the Court of Appeals remanded *Rodriguez* to the District Court, saying:

"While the record here is clear that this complaint cannot be dismissed upon the doctrine of forum non conveniens, this Court is unable to determine from the record before it if there are factual differences which might distinguish the instant case from the specific issues raised in Banco Nacional de Cuba v. Sabbatino, supra with respect to the Act of State doctrine. We conclude, therefore, that this case should be and is hereby remanded to the District Court to afford the parties opportunity to be heard upon development of such record as is found necessary by the District Court for its determination of the applicability of the Act of State doctrine to this complaint."

Rodriguez v. *Pan American Life Ins. Co.*, 340 F. 2d 707 (5 Cir. 1965). Then it remanded Tabacalera for the reasons given in *Rodriguez*.

Thus the scope of the inquiry on remand was to determine the limited question as to the existence of factual differences between *Sabbatino* and *Tabacalera*.

In its original answer to the complaint Standard Cigar had asserted that the account sued on had been assigned to Severiano Jorge (R. 46). Accordingly, on reversal, an amended complaint was filed, with leave of Court, and in it Jorge was made a party plaintiff (R. 67).

The amended complaint alleged that Tabacalera was organized under the laws of Cuba; that Jorge was the equitable owner of all the stock; that on April 1, 1961, the corporation had sold and assigned its interest in the claim to Jorge; that at the time of the commencement of the suit, he was a citizen of Cuba and a refugee from the revolution; that he has established his residence in Florida and intended to become a citizen thereof as soon as he had qualified.

The defendant answered, asserting inter alia that it adopted by reference the allegation in its second defense in the answer to the original complaint. This allegation consisted of charges that the matters involved in the suit were governed and controlled by the laws, resolutions, proclamations and decrees of the Republic of Cuba and was in effect an invocation of the defense of the Act of State Doctrine. This was also set up in the defendant's fourth defense, which alleged that the assignment from Tabacalera to Jorge was subsequent to the intervention or nationalization of Tabacalera, was contrary to the provisions and purposes of the intervention[2] and that the court should not undertake to determine the validity of such assignment. The original answer set up as its fourth defense, the following (R. 46):

---

2. While the assignment to Jorge was executed after the intervention, it was nevertheless supported by an agreement which was made *before* the intervention and for a consideration then passing to the corporation (S.R. 4).

> "On or about the 1st day of April, 1961, the plaintiff corporation assigned to Severiano Jorge, in writing, any right of action plaintiff had against the defendant, Standard Cigar Company."

A copy of the assignment was attached and made a part of the answer. As to this the Court of Appeals said:

> "It is of especial significance to note that in none of the subsequent pleadings has the defendant amended or modified its allegation that the plaintiff had 'assigned to Severiano Jorge, in writing, any right of action plaintiff had against the defendant, Standard Cigar Company'. In a subsequent defensive pleading, Standard contended that the assignment 'or purported assignment' was invalid because not within the power of the corporation to execute."

Thereupon several depositions were taken and affidavits filed and the plaintiff moved for summary judgment. The defendant did not move for such a judgment, although euphemistically it says that "the Petitioner asserted that it was entitled to a summary judgment." (Pet. 7). How, when or to whom it made this assertion is not revealed.

In any event, a long order was entered entitled "Findings of Fact and Conclusions of Law." (R. 162).[3] Based on this a summary judgment was entered for Standard.

On appeal the Court of Appeals reversed this judgment saying:

> "We conclude, therefore, that it was error for the trial court to dismiss the complaint by summary judgment. On the record before the trial court the appellants were entitled to have their motion for summary judgment granted. Such failure by the trial court is not, of course, appealable as such, because an order

3. It is not denied that this order was prepared by opposing counsel. Therefore, according to the statements in *U. S. v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, the order is not worth the paper it is written on.

denying a motion for summary judgment is an interlocutory order in the case and not a final order. However, it appears that there is not a material issue of any relevant fact under the law of the case as we conceive it to be. Both parties have had more than ample time to develop pleadings and fact issues and it now seems appropriate to direct that judgment be entered for the appellant Jorge as assignee of Tabacalera Severiano Jorge, S.A., *a status which the defendant, by its pleadings, concedes he holds if the Act of State Doctrine does not control the case.*"[4]

RESTATEMENT OF FACTS

Severiano Jorge was engaged in the tobacco business in Havana since 1942. The business was operated under the name of Severiano Jorge y Cepero, a sole proprietorship. From the beginning, the business made a substantial profit.

In 1954, in an attempt to expand the enterprise, Jorge incorporated the company under the name of Tabacalera Severiano Jorge, S.A. He owned all of the equitable interest in the corporation stock. The corporation gave a general power of attorney to Jorge and Romano (the latter had been in the family employ for nearly 50 years), empowering the grantees to rule, administer and govern all of the estate of the corporation and to collect and receive all proceeds, amounts, terms, rents, dividends and profits of the corporation (R. 159 and S.R. 1). In effect the corporation was Jorge.

For several years prior to 1960, the corporation from time to time sold substantial quantities of tobacco to Standard Cigar Company. The sales of tobacco to Standard were on account without any specific agreement as to the time and place of payment. In accordance with the

4. Emphasis supplied unless otherwise stated.

long standing custom in the tobacco industry in Cuba, the purchase price for tobacco sold and delivered was due no later than the Monday following the buyer's acceptance. Although Jorge made certain limited exceptions to the rule, which were granted only after negotiations therefor, the accounts with Standard for the shipments of tobacco made to it in July 1960 (being the shipments which are involved in this suit), were due and payable immediately upon receipt of the tobacco by the purchasers. There was no extension agreement or understanding between the corporation and Standard that it would be allowed between 90 and 120 days after shipment within which to pay the purchase price (S.R. 3). On the contrary, with respect to tobacco shipped to Standard after January 1, 1960, Jorge had an understanding with Stanford Newman of that company that payments would be made to Jorge individually and not to the Cuban government (Jorge R. 161). On several occasions during the months of August and September, 1960, while in Tampa, Florida, Jorge demanded payment from Newman of the monies owed by Standard (S.R. 4).

During the months of June and August, 1960, Jorge personally loaned to Tabacalera approximately $675,000.00 to enable it to pay for tobacco which it had purchased. It was understood by everyone, including Miguel, the President of Tabacalera, that Jorge would be repaid for these advances out of the proceeds from the resale of the tobacco to corporations in the United States, including Standard Cigar Company (S.R. 4).

The loan was used to meet payrolls and pay for tobacco sold to different customers in the States, including Standard Cigar Company (Romano's Dep. p. 12)

On September 15, 1960, Miguel informed Jorge who was in the States that the tobacco business had been inter-

vened, and Jorge did not thereafter return to Cuba (S.R. 4).[5]

On or about April 1, 1961, Romano, as Vice-President and Attorney-in-Fact for the corporation, in consideration of the loan of $675,000.00 executed an assignment to Jorge of the account owing by Standard and vested in Jorge the authority to sue for such sums (S.R. 4).

On p. 15 of its petition, as a part of the statement of the case, the Petitioner injects an argument respecting the character of the act under which the interventor allegedly took possession of the assets of Tabacalera. Here the Petitioner says that although the intervention procedure does not appear to effectuate a formal transfer of title from Tabacalera to the Cuban Government "the end result is indistinguishable in practical result from complete confiscation and nationalization." Cited in support of this position is a case entitled *F. Palicio y Compania, S.A.* v. *Brush*, 256 F. Supp. 483, 484, which will be referred to hereinafter. However, and regardless of the holding of the Court in that case, the uncontradicted testimony of the expert witnesses in the case sub judice was to the effect that the decree of intervention did not divest the stockholders of their interest in assets of the corporation and particularly did not divest Mr. Jorge of his interest acquired

5. The Court found that at this time Jorge had fled to Florida, leaving Tabacalera heavily indebted (R. 170) and that Florida and the United States had no contacts with transactions relevant hereto (R. 179). Yet in August, 1960, Jorge, while in the United States, had secured orders for approximately $1,000,000.00 worth of tobacco and had telephoned Miguel in Havana, telling him to arrange for shipment (S.R. 4). Miguel tried to make it appear that Tabacalera was insolvent but this was expressly refuted by Jorge who asserted that if Tabacalera's financial position had become impaired it was due to the acts of the interventor (R. 5). As of August 30, 1966 (1960) the corporation's total liabilities were $1,407,176.86 and its accounts receivable alone exceeded $1,230,614.13. The inventory processed and ready for shipment had a value in excess of $1,000,000.00 (id.).

under the power of attorney which was given to him by the corporation as above stated and which authorized him to collect and receive all proceeds, amounts, terms, rents, dividends and profits of the corporation including those then due or to become due in the future.

The testimony on this point was supplied by Dr. Eduardo LeRiverend, who was on the faculty of law of the University of Havana for 20 years and a Justice of the Supreme Court of Cuba (Dep. 4, 11). In this Dr. LeRiverend was also supported by Dr. Luis J. Botifoll, who practiced law in Cuba for 30 years and was General Counsel for the Commerce Department, a Doctor of Civil Law, a Doctor of Public Law and a graduate of Tulane University with a degree of LL.B.[6] (Dep. 4).

The existence and efffect of this power of attorney, together with the testimony of the Cuban lawyers was noted by the Court of Appeals in its opinion in which it said:

> "The only proof of the Cuban law that was before the trial court was in the deposition testimony of three Cuban lawyers, by whom it was made clear that the broad power of attorney executed by the corporation

---

6. "* * * In your opinion, did the resolution of the Decree of Intervention have the effect in law of displacing Mr. Jorge in the exercise of the powers attempted to be conferred upon him by that power of attorney?

A. No, for two reasons. First, because the intervention when they took only the management of the company, which is the only thing they took—took the possession of the management of the company, the man who runs the company. Now, in order to cancel a power of attorney of this type given by the stockholders of the corporation should be a resolution of the stockholders of the corporation to cancel the power of attorney. Point number one. And point number two, according to the Cuban law once a power of attorney is given the only way that you can revoke that power of attorney is going through certain formalities by which the person who has the authority to cancel has to go to a public notary, cancel the power of attorney before the notary, and notify the party who has the power. Unless you comply with that, the power is not cancelled."

in favor of Jorge and Romano could be revoked only by a similar document filed in the same registry in which the power of attorney had been filed. Even though we were to assume, contrary to the available evidence, that the power of attorney could be revoked in Cuba by a less formal act, there is an utter lack of proof that the interventor attempted to withdraw or revoke the power of attorney, probably since he knew nothing about it. The burden of proving such a revocation was, as a matter of defense, on the defendant below."

With this amplification of the facts we proceed to a discussion of Petitioner's argument.

SUMMARY OF ARGUMENT

I. The subject matter of the suit is a debt owed by a Florida corporation, which is collectible only at the domicile of the debtor and its situs was in Tampa, Florida. The debtor was not amenable to process in Cuba and was not subject to the operation of an alleged confiscatory decree passed by the Cuban government.

II. Cases dealing with the situs of debts for taxation purposes are inapposite. They constitute a class of cases which are sui generis and which have no application of the facts to the case at bar.

III. There is no conflict between the case sub judice and applicable decisions of other Courts of Appeal within the scope of Supreme Court Rule 19 s/d 1(b). The case most nearly in point to the case at bar is *Republic of Iraq* v. *First National City Bank*, 353 F. 2d 47 (C.A. 2, 1965) (Cert. den. 382 U.S. 1027), which involved the same principles and substantially the same factual situation.

IV. The Act of State Doctrine which Petitioner says is applicable here has, in fact, no application for the

reason as held in the Court of Appeals below that this Doctrine is inapplicable where the subject matter of the suit is intangible property located in the forum and subject to enforcement there.

V. The Respondents' title to the debt sought to be collected here is based in part upon a confirming assignment executed pursuant to a power of attorney given to the individual Respondent who was in fact the owner of the corporation. The facts before the District Court plainly substantiated the Respondents' claim based upon this power of attorney. The testimony demonstrated that the power of attorney was not affected by the subsequently enacted decree of intervention. There is no case in point cited by Petitioner dealing with a comparable situation.

Petitioner assaults the decision of the Court of Appeals on the ground that it is in conflict with decisions of other courts of appeal and is a decision on a Federal question and in a way in conflict with applicable decisions of this Court or is a decision of an important question of Federal law which has not been but should be settled by this Court in two respects: A) with regard to the situs of the debt sued on and B) with regard to the applicability of the Act of State Doctrine.

A. The Question As to the Situs of the Debt Owing by Standard Cigar Company.

Petitioner makes several statements regarding the assumed factual situation (Pet. 18) none of which are supported by the record in the District Court. It says that the account receivable involved herein arose out of contracts which were made and performed or to be performed in Cuba; that the tobacco which was the subject of the contract was delivered to and accepted by the Petitioner in Cuba[7] and that pursuant to the agreement of

7. Petitioner had no office or agents in Cuba so it is hard to see how it could have accepted the tobacco in Cuba.

the parties and the applicable Cuban monetary and currency control laws the sale and purchase price was to be paid by Standard to Tabacalera in Cuba. Petitioner further says that the United States had no contacts with the transaction unless the fact that Petitioner was a Florida corporation with its principal place of business in Tampa is so considered and that insofar as the transaction was concerned nothing occurred or was to occur in the United States.

Petitioner adds that the foregoing facts were and are undisputed and it was upon the basis of such facts that the situs of the account must be determined.

No record references are given to these statements. That they are not true is shown by the affidavit of Mr. Jorge.

Jorge's affidavit, which was not denied (S.R. 3) stated that on several occasions during the months of August and September, 1960 (the intervention took place on September 15, 1960), while in Tampa, Florida, he demanded payment from one Stanford Newman with the Standard Cigar Company (and one Karl Cuesta with the Antonio Company) of the amounts due for the shipments sued on. Also in his affidavit filed in the cause (R. 161) Mr. Jorge said that the shipments of tobacco made by Tabacalera from January 1, 1960 to September 15, 1960, were shipped from Cuba to consignees in the United States for the account of Continental Tobacco, Limited, except the shipment involved in this case and a companion suit, which were sold and delivered directly to Standard Cigar Company and the Antonio Company by the plaintiff to such consignees. He stated that the reason for the transaction being handled in such manner was that the individual plaintiff (Mr. Jorge) had an understanding with

Stanford Newman of Standard Cigar Company and Karl Cuesta of the Antonio Company that shipments for tobacco sold and delivered to such companies would be made to Jorge individually and not to the Cuban government (R. 162). This agreement was obviously made by the parties in anticipation of some possible act on the part of the Cuban government.

So, since the situs of the debt sued on depends on the facts then there is no question but that this was in Tampa, Florida, where the demand was made and where Jorge then was.

Nevertheless, the Petitioner says that the Court of Appeals erroneously held that the situs of the debt sued on was in Tampa, Florida, and says that this holding is in conflict with applicable decisions of this Court and Federal Courts of Appeal. The cases out of which this conflict is said to arise are:

Caldwell v. *Armstrong*, 342 F. 2d 485 (10 Cir. 1965).

Marteney v. *United States*, 245 F. 2d 139 (10 Cir. 1957).

Investment & Securities Co. v. *United States*, 140 F. 2d 894 (9 Cir. 1944).

Cleveland, etc. R. R. Co. v. *Pennsylvania*, 15 Wall. 300, 320 (1873).

Farmers Loan and Trust Co. v. *State of Minnesota*, 280 U.S. 204 (1930).

Curry v. *McCanless*, 307 U.S. 357 (1939).

Before proceeding to a discussion of these cases it should first be pointed out that, in practice, situs is not an inflexible, categorical concept, but is rather a factor, the determination of which depends upon the particular problem and the public policy involved therein. That the

Court of Appeals recognized the true nature of the concept is evident from its succinct review of the law with regard to the situs of intangible property, to-wit:

> "The situs of intangible property is about as intangible a concept as is known to the law. The suits may be in one place for ad valorem tax purposes, *Farmers Loan and Trust Co.* v. *State of Minnesota,* 280 U.S. 204; it may be in another place for venue purposes, i.e., garnishment, *Chicago R. I. & P. R. Co.* v. *Sturm,* 174 U.S. 710; it may be in more than one place for tax purposes in certain circumstances, *Curry* v. *McCanless,* 307 U.S. 357; it may be in still a different place when the need for establishing its true situs is to determine whether an over-riding national concern, like the application of the Act of State Doctrine is involved."

This holding is in accord with *Smith* v. *Ajax Pipe Line Co.,* 87 F. 2d 567 (C.A. 8, 1937), in which the Court held that the rule with respect to situs is a court made rule designed to work out practical justice, saying:

> "Being such, it is pushed no further than the reason for its existence justifies and where justice requires a departure therefrom exceptions are made, both in other fields of law and in taxation."

The word "situs" is defined as meaning site, the place where a thing is. In its natural signification, it is applicable only to landed estates since, strictly speaking, personal property cannot be said to have a situs. Situs with respect to intangibles now signifies power or jurisdiction over such intangibles rather than its old connotation of location (70 C.J.S., p. 1312). This is clearly expressed in *Kelly* v. *Bastedo,* 220 P. 2d 1069, 1072-73 (Ariz. 1950), wherein the Court in considering the situs of corporate stock for the purpose of levying an estate tax said:

"Appellees reason that stocks and secured promissory notes of a domestic corporation, being intangibles, are not property 'situated in this state,' but have their situs only at the domicile of the owner. Appellees arrive at such a conclusion by relying on the maxim of mobilia sequentur personam to determine the situs of intangibles for purposes of taxation. The basis for this reasoning is the feeling that intangibles must be treated in the same manner as tangibles, that is, at one time they may have a situs or location only at one place. This is fallacious because it ignores the fact that tangibles have a physical location whereas intangibles and choses in action exist only in contemplation of law, therefore, giving them a situs is a mere fiction.

The early cases adopted the fiction of situs or location of intangibles for use in determining conflict of laws problems. This concept of situs was then applied to problems of taxation so that in order to justify taxation, the property, tangible or otherwise, had to have a situs in the taxing jurisdiction. The decision of the United States Supreme Court in the case of *Curry* v. *McCanless*, 1939, 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A.L.R. 162, returned to the *Blackstone* v. *Miller*, 1903, 188 U.S. 189, 23 S. Ct. 277, 47 L. Ed. 439, doctrine that intangibles may have a taxable situs in more than one state. With the decision in the case of *State Tax Commission of Utah* v. *Aldrich*, 316 U.S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A.L.R. 1436, extending the implication and scope of *Curry* v. *McCanless*, supra, it became obvious that the United States Supreme Court began taking the more realistic view in respect to intangibles in that the right of states to tax depends not on the fictional theory of situs but on the fact that the intangibles are within the power and receive the protection of the taxing state."

In an effort to support conflict certiorari, the Petitioner has cited a number of mechanical and irrelevant

cases concerning the taxation of intangible property, cases involving the statutory requirements for priority with respect to federal income tax liens and a special situation involving support of former wife by divorced husband.

Petitioner avoids any reference to the cases dealing with the question of the situs of intangible personal property in the application of the Act of State Doctrine, and for good reason since without exception, all of the cases involving analogous factual situations hold that property such as we have here has its situs within the United States and that the Act of State Doctrine is not applicable.

In *Caldwell v. Armstrong, supra*, the Wyoming State Court granted a wife domiciled and divorced there a lien for delinquent support payments upon a matured life insurance policy issued by a Massachusetts company on her former husband who was also domiciled in Wyoming. This case is hardly support for the Petitioner's position and simply goes to show that situs concept is variable and elastic. Long ago, in *New England Mutual Life Insurance Company* v. *Woodworth*, 111 U.S. 138 (1884), it was held that an insurance policy issued by a company incorporated in another state payable to the insured was an asset for the purpose of founding administration upon her assets in another state in which the corporation had done business. In that decision letters of administration were granted in Illinois to surviving husband domiciled in Illinois, where the only asset in Illinois was an insurance policy on the life of the deceased wife, who died a resident of New York. The basis of the decision was that the obligation of the policy had a situs in Illinois. In the course of its opinion the Court said:

"The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, . . ."

Both *Marteney* v. *United States*, 245 F. 2d 135 (C.A. 10, 1957) and *Investment & Securities Co.* v. *United States*, 140 F. 2d 894 (C.A. 9, 1944), involved the question of perfecting Federal income tax liens under a Federal Statute providing that the liens would not become effective against mortgagees, pledgees, purchasers, or judgment creditors until notice thereof was filed in accordance with the law of the state in which the property subject to the lien was situated or was filed in the office of the Clerk of the United States District Court in the District where the property was located, if no state law was applicable.

A discussion as to the operation of the taxing statutes is to be found in *U. S.* v. *Eiland*, 223 F. 2d 118, 122 (4 Cir. 1955). Here the Court said that only tangible property can be said to be situated in a county and that with respect to intangible property entirely different provisions are needed and have been made by the taxing statutes.

In *The Cleveland etc. Railroad Co.* v. *Pennsylvania*, *supra*, cited and emphasized for what the Petitioner would have the Court believe to be a rigid rule of situs with respect to corporations, the Supreme Court was faced with the problem of the possibility of double taxation upon corporate assets. Here the State of Pennsylvania had attempted to tax bonds held by out-of-state bondholders and thus was acting beyond its jurisdiction. The Court feared the possibility of double taxation as the assets could likewise be taxed by the state in which they were located. The Court, therefore, adopted the practi-

cal solution of determining the situs for tax purposes to be at the state of the holder of the obligation.

Farmers Loan and Trust Co. v. State of Minnesota, supra, holds that the situs of bonds for taxation purposes is at the debtor's domicile. However, the Court cited a number of its earlier decisions which recognized the principle that choses in action might acquire a situs for taxation at places other than the place of domicile if they had become integral parts of some local business.

The rule in *Ajax Pipe Line, supra,* was echoed here by a statement in the course of the opinion that "taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences."

Curry v. McCanless, supra, which was also a tax case was a little more complicated than *Farmers Loan and Trust Co.* The fluidity of the situs concept was additionally demonstrated by the fact that in *McCanless* both Alabama and Tennessee were held to have the right to tax certain intangibles, the Court saying:

> ". . . On the contrary, this Court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. Bullen v. Wisconsin, supra, 240 U.S. 631, 36 S. Ct. 474, 60 L. Ed. 830; cf, Keeney v. Comptroller of New York, 222 U.S. 525, 537, 32 S. Ct. 105, 108, 56 L. Ed. 299, 38 L.R.A., N.S., 1139; Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 53 S. Ct. 244, 77 L. Ed. 463. That has remained the law of this Court until the present moment, and we see no reason for discarding it now. We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex

legal relationships which may be entered into between persons. This is the case because in point of actuality those interests may be too diverse in their relationships to various taxing jurisdictions to admit of unitary treatment without discarding modes of taxation long accepted and applied before the Fourteenth Amendment was adopted, and still recognized by this Court as valid. . ."

This disposes of Petitioner's "authorities".

On the other hand the numerous and varied cases from this and other Federal and State courts which have discussed the situs of intangibles plainly support the decision of the case sub judice.

First in order of importance, because it has been before this Court, is *Republic of Iraq* v. *First National City Bank,* 353 F. 2d 47 (C.A. 2, 1965) (cert. den. 382 U.S. 1027). In this case the Iraqi government sued the First National Bank to recover a deposit which had been made there by King Faisal and also to recover 4008 shares of Canada General Fund on deposit in custody accounts with the Irving Trust Co. of New York. The First National Bank had been appointed Administrator of the King's New York assets by the Surrogate's Court of that state.

By ordinance of the revolutionary government of Iraq, which recited that the former dynasty had exerted its influence to gain illegal wealth, the government decreed that all property of the dynasty movable or immovable should be confiscated.

In brushing aside the contention that the Act of State Doctrine was applicable and in holding that the assets did not belong to the Iraq government, the Court of Appeals said:

"In this case, neither the bank account nor the shares in the Canadian investment trust can realisti-

> cally be considered as being within Iraq simply because King Faisal resided and was physically present there at the time of his death; in the absence of any showing that Irving Trust had an office in Iraq or would be in any way answerable to its courts, we need not consider whether the conclusion would differ if it did. Cf. United States v. First Nat'l City Bank, 379 U.S. 378, 85 S. Ct. 528, 13 L. Ed. 2d 365 (1965). So far as appears on this record, only a court in the United States could compel the bank to pay the balance in the account or to deliver the certificates it held in custody. The property here at issue thus was within the United States. Although the nationality of King Faisal provided a jurisdictional basis for the Republic of Iraq to prescribe a rule relating to his property outside of Iraq, Restatement § 30 (1) (b), this simply gives the confiscation decree a claim to consideration by the forum which, in the absence of such jurisdiction, it would not possess—not a basis for insisting on the absolute respect which, subject to the qualifications of Sabbatino, 376 U.S. at 428, 84 S. Ct. 923, the decree would enjoy as to property within Iraq at the time."

In *Banco Nacional de Cuba* v. *First National City Bank of N. Y.*, 270 F. Supp. 1004 (S.D. N.Y. 1967), the Court applied the holding in *Republic of Iraq* to a similar situation. Here a number of Cuban banks, which were nationalized pursuant to Law No. 891 in October, 1960, had maintained accounts with the defendant in New York City. *Banco Nacional* as agent of the Cuban Government claimed these funds by virtue of the confiscation decree declaring it to have full title to the property of the Cuban banks who maintained these accounts in New York.

In rejecting this contention and ruling against the Cuban government, the Court went to the crux of the matter immediately, saying:

> "The short answer to this claim is simply that 'when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state "only if they are consistent with the policy and law of the United States."' Republic of Iraq v. First National City Bank, 353 F. 2d 47, 51 (2d Cir. 1965), cert. den., 382 U.S. 1027, 86 S. Ct. 648, 15 L. Ed. 2d 540 (1966), quoting ALI, Restatement of Foreign Relations Law § 46 (Proposed Official Draft, 1962). The Cuban decree, like the attempted confiscation of the accounts in *Republic of Iraq*, is plainly contrary to our policy and laws. It is not entitled to extraterritorial enforcement in United States courts as to property located within the United States. Republic of Iraq v. First National City Bank, supra; see F. Palicio y Compania v. Brush, 256 F. Supp. 481 (S.D. N.Y. 1966), aff'd per curiam, 375 F. 2d 1011 (2nd Cir. 1967); see Note, International Conflict of Laws: Limitations Imposed On Effect American Courts May Give Foreign Confiscations, 1966 Duke L.J. 828."

In *Re Russian Bank for Foreign Trade*, 1 Ch. Div. 745, 767 (1933), the Court held that where a debt owed by a nationalized Russian corporation was "locally situated" or "primarily recoverable" in England, it was not affected by Soviet nationalization decrees even though it was due to a person who was a Russian subject at the date of the decree. In so holding the Court said:

> "If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable:"

In *Augstein* v. *Banska A Hutni Akciova Spolecnost*, 124 N.Y.S. 2d 446 (1953), a Czechoslovakian corporation

ostensibly owned property in New York, which was allegedly purchased with funds on deposit in a New York Bank. The complaining stockholder, a Jewish refugee, who fled for his life when Hitler invaded Czechoslovakia, was outlawed by the communist dominated regime which charged him with misconduct so as to deprive him of his property.

The New York Court held that it had jurisdiction over the defendant corporation and that the stockholder had a right to pursue the diversion of funds which had made his stock worthless. The Court said that the assets of the defendant Banska had been "nationalized" but that the Courts of New York denied validity to such nationalization decrees as to assets within the state.

F. Palicio y Compania, S.A. v. *Brush,* 256 F. Supp. 481, 492 (D.C. N.Y. 1966), cited and relied upon by the Petitioner, except as to matters relating to situs, was a suit brought in the name of five intervened Cuban businesses. The dispute involved the rights of the interventors who took possession of the businesses intervened and assets of certain manufacturers on behalf of the Cuban government and the dispossessed former owners to pursue in the District Court suits for the purchase price of Cuban cigars sold and delivered to U. S. importers by the interventors and for trade-mark infringement. The disposition of the case with respect to the cigars is discussed hereinafter. With respect to the rights in the trade-mark, the Court said that the effect of the confiscatory interventions could best be evaluated by determining whether recognition of a transfer of title to U. S. trade-marks would give an impermissible extraterritorial effect to the taking.

The Court said that the interventors were not entitled to enforce in our Courts claims arising out of property

rights represented by trade-marks registered with the United States Patent Office.

In the course of its opinion the Court quoted from *Zwack* v. *Kraus Bros. & Co.*, 237 F. 2d 255, as follows:

> "where firm assets existing in the forum are concerned, technical considerations as to the manner in which the foreign state seeks to expropriate them are not controlling. * * *. It is clear that the (foreign) government could not directly seize the assets which have a situs in the state of the forum. To allow it to do so indirectly through confiscation of firm ownership would be to give its decree extraterritorial effect and thereby emasculate the public policy of the forum against confiscation."

In *Bank of Jasper* v. *First National Bank of Rome, Ga.*, 258 U.S. 112, 42 S. Ct. Rep. 202 (1922), this Court (per Brandies, J.) held that an open account owed by a resident debtor to a non-resident creditor was property of the creditor situated within the state over which the State courts can acquire jurisdiction.

In *Chicago, R. I. & P. R. Co.* v. *Sturm*, 174 U.S. 710 (1899), this Court held regarding the maintenance of a foreign attachment, that the situs of a debt was wherever the debtor can be found saying:

> *". . . To do it you must go to the domicile of his debtor, and can only do it under the laws and procedure in force there.*[8] *This is a legal necessity, and consideration of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands.*

8. The Florida Court echoed the same sentiment in *Courtlandt Corporation* v. *Whitmer*, 121 So. 2d 57, 59 (D.C.A. 2, 1960), when it said: "It seems unrealistic to say that a cause of action 'arises' at a place where the action cannot be maintained."

That something is the res, and gives character to the action, as one in the nature of a proceeding in rem. . . ."

In *McGrath* v. *Agency of Chartered Bank of India, etc.*, 104 F. Supp. 964 (1952), the District Court held that the credit on the defendant's books sought to be reached was a debt to German Nationals representing property within the United States and therefore subject to vesting. The defendant, after acknowledging that for purpose of the Trading with the Enemy Act, 50 U.S.C.A., Appendix, § 1 et seq., a debt is property which may be seized by the appropriate federal authority, asserted that the debt, having been collected in the Philippines and payable in Hamburg, is not property within the United States subject to seizure. In reply thereto, the Court stated:

> "In support of the proposition that there is no property within the United States, defendant argues that the debt was payable in Germany. *But the place of payment is not the criterion of a debt's situs.* Chicago, Rock Island & Pacific Railway Co. v. Sturm, 1899, 174 U.S. 710, 19 S. Ct. 797, 43 L. Ed. 1144. What does control the power to enforce payment of a debt is the court's power over the person of the debtor. Blackstone v. Miller, 1903, 188 U.S. 189 at pages 205-206, 23 S. Ct. 277, at page 278, 47 L. Ed. 439, per Mr. Justice Holmes: . . ."

See also *Baumgardner* v. *Southern Pac. Co.*, 177 S.W. 2d 317 (1943); *Isthmian Lines, Inc.* v. *Canadian Stevedoring Company*, 216 F. Supp. 856; *Weinress* v. *Bland*, 71 A. 2d 59; *Burkhart* v. *Circuit Court of Eleventh J. Circuit*, 1 So. 2d 872 (Fla. 1941); *Atkinson* v. *Superior Court*, 310 P. 2d 145; *Rogers* v. *Smith*, 185 F. Supp. 401.

This last case contains some significantly sensible observations. For example:

> "* * * An intangible obligation to pay, whether or not evidenced by a bond or negotiable instrument, has no

'situs' in the sense of location in space. See First National Bank of Boston v. Maine, 284 U.S. 312, 328, 332, 52 S. Ct. 174, 76 L. Ed. 313; Powell, The Business Situs of Credits, 28 W.Va.L.Q. 89. What matters for purposes of 'jurisdiction' is that the obligor is here and can be made to pay. Standard Oil Co. v. New Jersey, 341 U.S. 428, 71 S. Ct. 822, 95 L. Ed. 1078; Curry v. McCanless, 307 U.S. 357, 365-367, 59 S. Ct. 900, 83 L. Ed. 1339; State Tax Comm. v. Aldrich, 316 U.S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358 (overruling First National Bank of Boston v. Maine, supra, on other grounds). In a real sense, there is property here which can be effectively dealt with when an obligor is here. Harris v. Balk, 198 U.S. 215, 222-223, 25 S. Ct. 625, 49 L. Ed. 1023; Chicago, Rock Island etc. Ry. v. Sturm, 174 U.S. 710, 715-716, 19 S. Ct. 797, 43 L. Ed. 1144. Cf. Canada Southern Ry. v. Gebhard, 109 U.S. 527, 3 S. Ct. 363, 27 L. Ed. 1020. The bond itself would be substantially worthless if the United States would not enforce its recognition by the obligor, and the same holds true of a coupon detached therefrom."

These cases, some of which deal with the precise question here presented, clearly refute Petitioner's statement that the decision of the Court below was in conflict with other applicable Federal cases. That just simply is not so.

B. The Applicability of the Act of State Doctrine.

Petitioner says (p. 26):

"In its opinion, the court of appeals correctly stated the act of state doctrine as announced in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), but erroneously, petitioner submits, decided that such doctrine is not applicable in this action."

On the question of the applicability of this doctrine, the Court of Appeals said:

"In the reconsideration we are required to make of the present case by the Supreme Court's mandate, we look first to see to what extent the facts are similar. Two points of dissimilarity are immediately apparent. The first need not be fully developed because it may really be a distinction without a difference if all of the facts were fully known, and because appellants need not rely upon this circumstance as a basis for the relief they seek here. This difference is that in the *Sabbatino* case the act of the Cuban government was a direct and open confiscation of the property of the Cuban-based sugar corporation, whereas in the instant case, the act of the Cuban government amounted only to 'in intervention' for the period of one year.[3]

The really important point of difference between the facts of this case and that of *Sabbatino* is that the subject of the confiscation in the latter case was a ship's cargo of sugar which was present in the territorial waters of Cuba—tangible personal property—whereas in the case before us the subject of the alleged 'taking' by the government of Cuba is a credit owed to the Cuban corporation (albeit arising out of a Cuban transaction), by an American creditor domiciled in Tampa, Florida."

---

3. "It is argued in the *brief* of the appellee that somehow after the end of the year the Cuban government acquired some additional absolute powers or rights as to the assets of Tabacalera, amounting in effect to confiscation. The record is void of any proof of what actually was the status of affairs, although we may feel fairly certain that the Cuban government has not affirmatively relinquished whatever rights it had to supplant the original directors and stockholders and officers of this corporation."

Petitioner argues that this holding is contrary to the decisions of this Court in two respects:

1. A conflict as to extraterritoriality between Tabacalera and *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942); *Steingut* v. *Guaranty Trust Co. of N. Y.*, 58 F. Supp. 623 (D.C. N.Y. 1944), aff'd 161 F. 2d 571 (2 Cir. 1947), cert. dismissed 332 U.S. 753, cert. den. 332 U.S. 807.

2. A conflict regarding the validity of a power of attorney between Tabacalera and *F. Palicio y Compania, S.A.* v. *Brush*, 375 F. 2d 1011 (2 Cir. 1967), cert. den. 389 U.S. 830, aff'd per curiam 256 F. Supp. 481 (S.D. N.Y. 1966).

1. The Conflict As to Extraterritoriality.[9]

There is no conflict, real or apparent, between the decision below and any of the cited cases as a consideration will show.

In *United States* v. *Belmont, supra*, the Government brought suit as assignee of the Soviet Government of Russia, under what is known as the Litvinov Agreement, to recover from a banker in the United States moneys deposited with him by a Russian corporation. The assets of this company had been nationalized and appropriated by the Soviet Government and had been assigned to the United States as part of a plan to bring about a settlement of the mutual claims of the two governments.

The case furnishes no basis for the lower Court's judgment.

Both Russia and the United States were dealing with each other on levels far above the position occupied by Standard Cigar Co. That corporation is simply trying—

9. This point is discussed. See pp. 26-27.

and so far with success—to keep the tobacco and the money. In *Belmont* the high contracting parties were settling mutual claims which probably resulted in benefit to United States Nationals (Tex. 326). Even in the absence of this factor, the United States probably had the right as against non-resident aliens to seize their assets to satisfy its own nationals' claims. Cf. *Meade* v. *United States*, 2 Ct. Cl. 24, aff. 9 Wall. 691.

The same comment applies to *Pink* and these cases, including *Steingut*, directly support the conclusion of the Court of Appeals below.

The confiscatory decrees of the Soviet government were not given effect because of the Act of State Doctrine. They were decided on the basis that the Litvinov Agreement as a conscious act of foreign policy of the United States was valid and it is absolutely clear that if it had not been for the Litvinov Agreement effect would not have been given to the Russian decrees.

This is not only a matter of general knowledge, but it has been judicially recognized. In *Bollack* v. *Societe Generale Pour Favoriser, etc.*, 33 N.Y.S. 2d 986 (1942):

> "* * * The effect of these decisions is that the Litvinov assignment and the title acquired thereunder must be given effect regardless of any local public policy to the contrary. This result was reached by the Supreme Court of the United States upon the ground that this agreement was an integral part of the adjustment of our foreign relations with Russia and that the exercise of this power by the Executive Department of the United States Government was superior to any other consideration."

F. Palicio y Compania, S.A. v. *Brush, supra*, certainly is a broken reed as far as Standard is concerned. The suit was brought on behalf of five intervened Cuban

tobacco manufacturers acting for the Cuban government to recover the purchase price of cigars manufactured and sold both before and after the intervention. In holding that the plaintiffs were entitled to recover for the cigars *sold* after the intervention the Court said:

> "It does not necessarily follow, however, that the act of state doctrine is dispositive of this case. For 'when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state "only if they are consistent with the policy and law of the United States."' Republic of Iraq v. First Nat'l City Bank, 353 F. 2d 47, 51 (2 Cir. 1965), quoting Restatement, Foreign Relations Law of the United States 46 (P.O.D. 1962). In the language of the cases our courts will not give 'extraterritorial effect' to a confiscatory decree of a foreign state, even where directed against its own nationals. E.g., Zwack v. Kraus Bros. & Co., 93 F. Supp. 963, 966 (S.D. N.Y. 1954), aff'd, 237 F. 2d 255, 259 (2 Cir. 1956); Blanco v. Pan-American Life Ins. Co., 221 F. Supp. 219, 227 (S.D. Fla. 1963); Compania Ron Bacardi, S.A. v. Bank of Nova Scotia, 193 F. Supp. 814, 815 (S.D. N.Y. 1961); Naamloze Vennootschap Suikerfabrik 'Wono-Ash' v. Chase Nat'l Bank, 111 F. Supp. 833, 841 (S.D. N.Y. 1953) (Kaufman, J.). Accordingly, 'foreign confiscatory decrees purporting to divest nationals and corporations of the foreign sovereign of property located in the United States uniformly have been denied effect in our courts * * *.' Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 447, 84 S. Ct. 923, 950 (1964) (White, J., dissenting), citing *inter alia*, Moscow Fire Ins. Co. of Moscow v. Bank of New York & Trust Co., 280 N.Y. 286, 20 N.E. 2d 758 (1939), aff'd by an equally divided court sub nom. United States v. Moscow Fire Ins. Co., 309 U.S. 624, 60 S. Ct. 725, 84 L. Ed. 986 (1940); Vladikavkazsky R. R. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934). The application of this principle raises the significant questions here.
>
> * * *

On September 15, 1960, all the physical assets of the five entities in Cuba, including the plants and inventory of cigars and tobacco, were taken over by the Cuban government. As in *Sabbatino, the property physically* in Cuba 'was expropriated *rather than a contractual claim*' 376 U.S. at 413. The interventors, from then on in possession and control of the five entities, continued the manufacture of cigars in the seized plants from the tobacco on hand and no doubt such other tobacco as had to be procured.[7] They subsequently sold the finished cigars to the United States importers who have not yet paid for them. *For purposes of this case the interventors are claiming only the price of cigars shipped after the intervention.*[8]

Viewed in these terms the *situs* of the *debts due* from Faber, Coe & Gregg, Dunhill and Saks & Co. *is quite immaterial.* These obligations accrued by reason of sales completed *after* plaintiffs had been intervened. No debts were in existence at the time of the intervention. In short, the take-overs were fully executed under Cuban law before the trade acceptances and other obligations involved in this dispute arose.

Under *these* circumstances the act of state doctrine operates to prevent this court from questioning the validity of acts of seizure by the Cuban government of tangible physical property located in Cuba. I am compelled to refrain from examining the validity of these seizures for the strong policy reasons so fully

---

7. In an affidavit presented more than two months after the final stipulation of facts was filed with the court the former owners maintain that all the cigars had already been manufactured at the time of the seizures. The interventors refused to stipulate this fact and it is in dispute. Even were it established, however, it would be immaterial.

8. In order to avoid confusing the issues the interventor has expressed willingness to turn over to the defendants the small sum representing 'the price of cigars shipped prior to intervention,' provided the court rule in plaintiffs' favor with respect to the balance. Reply Brief for Plaintiff, p. 7.

stated by Mr. Justice Harlan in *Sabbatino*, and indeed, insofar as seizure of the physical property located in Cuba is concerned, by Mr. Justice White in his *Sabbatino* dissent. 376 U.S. at 445-47.

Accordingly, it is plain that the debts due for the price of cigars shipped *after* the interventions are owing to the interventors and not to the former owners who had been dispossessed of their property. The Cuban government has unequivocally directed that the interventors are empowered to sue to recover these obligations on behalf of the five plaintiffs, and this court may not question the validity of that decree."

It is difficult to see how the language in this opinion helps the Appellee.

According to the Petitioner's contention the decree of intervention involved in the above case is the same one as is involved in the case at bar. Therefore, when the Court said that the physical assets were seized under this decree "rather than a contractual claim" this was tantamount to holding that the decree did not affect foreign accounts receivable.

From these cases it is plain that the decree of intervention had no extraterritorial effect and that therefore the Act of State Doctrine may not be applied.

But if there ever had been a question about this point, it was completely removed from the case by the finding of the District Court that *the intervention and nationalization* of *Tabacalera did not purport to effect (sic) property located in* the United States (R. 183).

"If this is true," as the Court said in the *Pink* case, *supra*, "it is decisive of the present controversy."

This question as to extraterritoriality should be considered as settled here by the holding of the Court of Appeals in *King Faisal's* case (*Republic of Iraq* v. *First*

National City Bank, supra). In this case the holding is summed up in Headnote 12, as follows:

> "A Republic of Iraq ordinance confiscating all property of deceased King was not consistent with United States policy and laws and would not be enforced as to King's New York Bank account and his stock held in a custodian account in New York bank."

In *King Faisal's* case, the Court cited *Vladikavkazsky Railway Company* v. *New York Trust Co.*, 189 N.E. 456, 460 (N.Y., 1934), 91 A.L.R. 1426, 1430. This was an action to recover a bank deposit in plaintiff's name in a New York bank. Plaintiff was a Russian corporation which had been dissolved, whose property had been confiscated and whose obligations had been repudiated by the Kerenski regime. Its directors were refugees residing in Paris and allegedly were going to use the sums on deposit for improper purposes instead of applying them to payment of claims of local creditors.

In holding that the corporation, though dissolved and its directors non-residents of New York, could recover the Court, with these words, penetrated to the kernel of the case:

> "* * * In the case at bar, as in the other Russian cases which came to this court before the recognition of the present Russian government, the practical question was and is, *Shall the law compel a debtor in this state to pay its debt or permit it to hold the property of its creditor indefinitely?* This court definitely answered the question by deciding that, although the corporation in question was extinguished in its homeland and there dead in the eyes of the law, it continued its existence as 'a juristic person with capacity to sue' in this state." (Emphasis supplied).

and also:

> "Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail. Russian Socialist Federated Soviet Republic v. Cibrario, supra.
>
> It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets, and the repudiation of its obligations by decrees, are contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. Baglin v. Cusenier Co., 221 U.S. 580, 31 S. Ct. 669, 55 L. Ed. 863."

In *Re Russian Bank for Foreign Trade*, 1 Ch. Div. 745, 767 (1933), the Court held that where a debt owed by a nationalized Russian corporation was "locally situated" or "primarily recoverable" in England, it was not affected by Soviet nationalization decrees even though it was due to a person who was a Russian subject at the date of the decree. In so holding the Court said:

> "If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable: see *Rex* v. *Lovitt*,[1] *New York Life Insurance Co.* v. *Public Trustee*[2] and, *English Scottish and Australian Bank, Ld.* v. *Inland Revenue Commissioners*.[3]

1. (1912) A.C. 212.
2. (1924) 2 Ch. 101.
3. (1932) A.C. 238.

> The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. This follows, I think, from the decisions of Hill J. and the Court of Appeal in The Jupiter (No. 3).[4] It is interesting to note that the same view is taken by the R.S.F.S.R. itself in a circular dated April 12, 1922, and in a circular issued by the People's Commissariat of Justice to all Districts Courts dated September 26, 1923, which are set out in the elaborate judgment of Hill J. above referred to. These circulars show that the Soviet Government does not regard the nationalizing decrees as having any extra-territorial effect even as against Russian citizens. Moreover, it is evident that our Courts have never entertained the view that a debt incurred here by a foreign corporation permitted to carry on business here under English law can be discharged by a foreign statute."

Sedgwick, Collins & Co. v. *Rossia Insurance Company of Petrograd*, 1 K.B. 1 (1926), involved garnishment by a local creditor of a Russian corporation for a debt owing to it by a local debtor. The Court held that debts owing to the Russian corporation by local debtors were not altered by the nationalization decrees of the Russian government. In his opinion, Sargant, L. J., said:

> "Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which 'nationalized' the undertaking and assets of the Rossia Insurance Company, that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from

4. (1927) P. 122, 144, 145; 250.

debtors here: see Dicey, Conflict of Laws, 2nd ed., p. 310, and *Lecouturier* v. *Rey*[3], an analogous case with reference to the goodwill of a trade mark or trade name in England."

On appeal to the House of Lords, the decree was affirmed. *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.*, 1927 A.C. 95.

2. The Conflict Regarding the Validity of the Power of Attorney.

It is here contended that in *F. Palicio, supra*, the District Court whose opinion was affirmed per curiam held that the order of intervention there involved operated as an expropriation statute and that this is the self same order as is involved in the case sub judice. It is therefore contended that when the Court of Appeals in the case at bar held that the intervention decree did not revoke the power of attorney from Tabacalera to Jorge it thereby collided with the decision of the District Court as affirmed in *F. Palicio*.

There are several obvious flaws in this argument.

First. Rule 19 s/d 1 (b) of this Court provides that review on writ of certiorari is one of sound judicial discretion and will be granted only where there are special and important reasons therefor. In sub-paragraph (b) the reasons for granting the writ are elaborated upon and that section provides in part that one of the reasons to be considered is where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

Now obviously the question as to the validity of the power of attorney from Tabacalera to Jorge was in no wise

3. (1910) A.C. 262.

involved in *F. Palicio,* and so no conflict between the two Courts of Appeal could exist.

Secondly. The per curiam affirmance by the Court of Appeals for the Second Circuit of a decision of the District Court does not create a basis for conflict certiorari because of statements in the District Court's opinion allegedly contrary to those of the Fifth Circuit.

Thirdly. The Court's opinion as to the effect of the order of intervention on the power of attorney previously given to Mr. Jorge was based upon testimony which the Respondents offered, none of which was disputed by the Petitioner. As was said in *Zwack* v. *Kraus Bros., supra,* cited in *Palicio* it was clear that the foreign government could not directly seize the assets which have a situs in the state of the forum and that to allow it to do so indirectly through confiscation of firm ownership would be to give its decree extraterritorial effect and thereby emasculate the public policy of the forum against confiscation.

In *F. Palicio y Compania, S.A.* v. *Brush, supra,* the Court in disposing of the contentions with respect to the confiscatory character and effectiveness of the Cuban Decree of Intervention said:

> ". . . In the language of the cases our courts will not give 'extraterritorial effect' to a confiscatory decree of a foreign state, even where directed against its own nationals."

The Court went on to say then that all of the physical assets of the five Cuban cigar manufacturers, including the plants and inventory were taken over by the Cuban Government, adding that "As in *Sabbatino, the property physically* in Cuba 'was expropriated *rather than a contractual* claim' 376 U.S. at 413" In summing up the Court said that

the debts due for the price of cigars shipped *after* the interventions were owing to the interventors and not to the former owners who had been dispossessed of their property.

For cigars sold *prior* to the intervention, which is the case here, the money owing was conceded to be in the prior owners.

Since Jorge was the grantee of the power of attorney from Tabacalera and had, in effect, a power coupled with an interest and since he was physically present in the United States when the decree of September 15, 1960, was passed, and since the right to exercise the power followed Mr. Jorge's person it follows that his rights could not be revoked by the Cuban decree.

CONCLUSION

The general rule of the decided cases in this Court respecting the granting of writs of certiorari in conflict cases has been stated by Corpus Juris (36 C.J.S. § 204 (3) p. 644) as follows: "Ordinarily the writ will not issue to review the evidence, to bring up questions not of general importance, or to review a case where the error does not affect the substantial rights of the parties." Also the text says that the conflict must be with the decision of another Court of Appeals on the same matter.

Viewed in this light it is evident that the petition in this case is without merit. The basic question has already been decided by this Court and the lower Court faithfully followed the ruling. So there is no conflict as contemplated

by Rule 19 subd. 1(b). It is therefore respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

.....

SHUTTS & BOWEN,
Attorneys for Respondents,
10th Floor, First National Bank Building,
Miami, Florida 33131

I HEREBY CERTIFY that a copy of the foregoing Respondents' Brief in Opposition to Petition was mailed to FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM, ESQS., Attorneys for Petitioner, First Federal Building, Tampa, Florida, 33602, this ..... day of September, 1968.

.....